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6 **BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

7
8 WASTE CONNECTIONS OF
WASHINGTON, INC.,

9 Complainant,

10 v.

11 ENVIRO/CON & TRUCKING, INC., a
12 Washington corporation; and, WASTE
MANAGEMENT DISPOSAL SERVICES OF
13 OREGON, INC.,

14 Respondents.

DOCKET NO. TG-071194

MOTION OF COMPLAINANT WASTE
CONNECTIONS OF WASHINGTON,
INC. FOR LEAVE TO FILE
AMENDED COMPLAINT

15 1 Pursuant to WAC 480-07-375, WAC 480-07-395 and Orders No. 05 and 06 in this
16 matter, Waste Connections of Washington, Inc. ("WCW") 9411 N.E. 94th Avenue,
17 Vancouver, Washington, 98662, seeks the Commission's leave to file an amended
18 complaint against Enviro/Con & Trucking, Inc. and Waste Management Disposal
19 Services of Oregon, Inc. ("Respondents"). The amended complaint is enclosed with
20 this filing. In support of its motion, WCW states the following:

21 2 The amended complaint responds to the Commission's holdings in Order No. 05,
22 particularly with respect to paragraph 2, section 18 of that Order, and in addition to
23 leave to file an amended complaint, asks that a hearing finally be conducted to establish
24 a factual record as to whether the Respondents' operations violate RCW 81.77.040 and
25 WAC 480-70-081, as originally alleged. The amended complaint ultimately seeks a

MOTION OF COMPLAINANT WASTE CONNECTIONS OF
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COMPLAINT - 1

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1 finding from the Commission that the operations of the Respondents in 2007
2 (apparently ending sometime early in 2008)¹ violated RCW 81.77.040 and
3 WAC 480-70-081, amongst other provisions. In addition to a hearing to be convened
4 on the allegations and a request that the Commission find the operations of one or more
5 of the Respondents in violation of the cited provisions, the amended complaint attached
6 hereto also seeks to refer any violations established by virtue of the complaint hearing
7 to the Attorney General's office to consider seeking imposition of monetary penalties to
8 be imposed by the Commission in amounts up to \$100 or \$1,000 per violation under
9 RCW 81.04.385, 81.04.387 and 81.04.405 *et seq.*

10 3 Despite the Respondents' anticipated position that the amended complaint address their
11 persistent argument about mootness of the case and otherwise be dismissed,² based on
12 Order No. 05, the Superior Court's ruling remanding to the WUTC in Thurston County
13 Cause No. 08-2-02593-1, and previously-submitted pleadings in this file, Complainant
14 correctly understands that the prior Commission ruling was that the *remedy* originally
15 sought was moot and that the present issue is only whether leave will be granted to
16 amend the original complaint. (*See* ¶ 16 Order No. 05). Indeed, that posture is fully
17 consistent with previous rulings on post-filing mootness by the Commission.³ As Order
18 No. 05 suggests, the Complainant now simply wishes to amend the current complaint to

19
20 ¹ For historical and chronological context of the Evergreen Aluminum job site only, see the attached Declaration
of Troy L. Tyacke (¶¶ 3-5) previously submitted by the Respondents in support of their previous Motion for
Summary Adjudication, attached hereto as Exhibit "1."

21 ² Ironically, even if the *Complainant* (or, by stipulation, with the Respondent), were now to seek dismissal rather
22 than attempt amendment of its complaint, that would not necessarily resolve this matter. In a complaint
proceeding, the Commission does not merely act to resolve the interest of private parties to the action, but
23 adjudicates in the broader public interest. (*See*, Order No. 5 at ¶ 17-18). Dismissal of a complaint is therefore an
exercise of discretion by the Commission, not a matter of right. *See also*, Order MVG No. 135801, *In re F. Allen
Forler d/b/a A.F. Excavating*, App. No. P-70777 (April, 1987).

24 ³ "In addition, whether the Respondent is now providing service does not affect the facts upon which the
25 complaint, filed in September, is based. The complaint is not necessarily rendered moot by the
Respondent's efforts to cure to [sic] conduct complained of." Order TS-90097, *In re Clipper Navigation,
Inc. v. Puget Sound Express, Inc.* (Nov. 1990) at 1. [Emphasis added].

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1 revise the remedies sought and continues to request a formal ruling by the Commission,
2 as it has throughout, that the activities complained of violate Washington law.

3 4 In opposing this motion, Respondents can hardly claim “prejudice” or “surprise” at this
4 juncture since they have known since October, 2008 and Order No. 5 that a complaint
5 amendment was looming despite the hiatus caused by their petition for judicial review.
6 5 Denial of this motion would not only appear contrary to the liberal pleading mandates
7 of CR 15⁴ and the notions of effecting justice under WAC 480-07-395, but would
8 simultaneously permit post-filing events in a complaint action to predetermine potential
9 outcomes in a manner contrary to public policy in the promotion of “. . . the public
10 interest in the enforcement of the law . . .” Order No. 5, ¶ 18.

11 6 As the assistant attorney general also noted in his Reply Brief in the Superior Court
12 action, administrative agencies may freely allow amendments to complaints, pleading is
13 far more flexible in administrative contexts than in civil courts, and amendments to
14 complaints should be consequently more broad in administrative proceedings than in
15 civil courts. *See*, Reply Brief of Respondent Washington Utilities and Transportation
16 Commission, in Thurston County Cause No. 08-2-02393-1 at 18.

17 7 Moreover, contrary to the further anticipated claim by Respondents that Complainant
18 not only identify, but at this initial amended complaint/prehearing conference stage,
19 fully justify and prospectively apply all specified potential meaningful remedies for
20 violations of law alleged in the complaint prior to development of an evidentiary
21 hearing record or automatically be subject to dismissal with prejudice, such outcomes
22 are wholly contrary to the premise of, and liberal amendment to, notice pleadings.
23

24 ⁴ Even in the more stringent civil trial complaint amendment setting, plaintiffs have been permitted leave to amend
25 by adding alternative remedies, such as claims for monetary damages **during** a trial, obviously far later in the due
process stage than at this still preliminary prehearing conference stage. *See Guyton v. Temple Motors, Inc.*, 58
Wash. 2d 828, 829, 365 P.2d 14 (1961).

1 8 Indeed, the Commission observed in its conclusion of law no. 2 paragraph 37 in Order
2 No. 5, above, that “[a] complaint brought by a private entity under the first paragraph of
3 RCW 81.04.110 alleging violation of laws or rules **is an enforcement proceeding**”
4 [emphasis added], which means that the threshold issue in such a proceeding is whether
5 a violation of law has occurred. In its revised prayer for relief in the amended
6 complaint, Complainant alludes to possible fines under RCW 81.04.385, RCW
7 81.04.387 and RCW 81.04.405,⁵ for example that may be available, and which general
8 fund violation fines would be “meaningful” as sanctions to deter future violations by
9 these or any other Respondents who operate without certificate authority. Again, to
10 require any more detailed articulation of available meaningful remedies at this stage in
11 denying Complainant’s motion to amend (or in the face of a motion to dismiss), would
12 appear to be contrary to the spirit of the Civil Rules, administrative law doctrine
13 favoring liberal pleading amendments and to Order No. 5, in forcing a Complainant
14 without benefit of an evidentiary hearing record to “pick and choose” among remedial
15 statutory provisions that may not yet be fully susceptible to application or argument
16 prior to any evidentiary presentation.

17 9 Respondents may also likely contend that such remedies are unavailable to Petitioners
18 and that Petitioners’ Motion to Amend should be denied. Any such argument, however,
19 is without merit. First, the pertinent regulatory framework clearly envisions broad
20 imposition of penalties against “[e]very corporation...which shall violate any provision
21

22 ⁵ And unlike UT-040535, Order No. 3, the *Glick v. Verizon Northwest, Inc.* (Jan. 2005), case upon which
23 Respondents have repeatedly relied, Complainant here recognizes it can neither seek to automatically impose any
24 fine directly on Respondents nor receive any tariff credit or benefit directly on its own behalf, but rather files a
25 complaint alleging violation of Commission law and rule in which it seeks a ruling that can be referred to the
Commission staff for possible further action. Denying Complainant that threshold right by finding the statutory
penalty provisions unavailable while previously acknowledging a cease and desist order is moot, would not only
vitiating *all* of RCW 81.04.110 for a private party complainant here, but would contradict Order No. 5’s reminder
that a private party complaint under RCW 81.04.110’s first paragraph implicates the public interest.

1 of this title...” RCW 81.04.387, and that complaints alleging such conduct may be
2 made by the Commission or by any person or corporation. RCW 81.04.110.

3 10 Second, in matters affected with the public interest such as the regulation of the solid
4 waste transportation industry, private complainants are often permitted to sue to protect
5 the public interest. *See, e.g.*, at the federal level, 42 U.S.C. § 6972 (authorizing citizen
6 suits against transporters of solid waste). This principle and its logical extension to
7 intrastate regulation recognizes the concerns previously articulated by Chris Rose,
8 former WUTC Director of Regulatory Services, that the Commission may lack the
9 available resources to police all alleged violations that implicate the public interest and
10 that, without private participation, such alleged conduct may go unregulated. (*See*,
11 Declaration of Chris Rose Regarding Initial Order No. 3 on Summary Determination at
12 ¶ 7, 11), attached hereto as Exhibit 2. Thus rather than merely constituting “an
13 academic question,” or simply “wanting to be proven right” (Initial Order No 3 at 5),
14 litigating this issue in the public interest may serve a strong regulatory purpose without
15 which private party complaint initiation the issues would never have been addressed.

16 11 Finally, denial of this motion to amend would also unquestionably constrain the ability
17 of the agency on a hearing record in which Complainant has the burden of proof to
18 fashion a selected remedy to policy which is peculiarly within the agency’s expertise,
19 *Skold v. Johnson*, 29 Wn. App. 541, 550-51, *rev. denied* 96 Wn. 2d 1003 (1981), and
20 preempt its ability to address effective remedies implicated during development of the
21 hearing record and/or upon completion of the complainant’s case. Thus, even if the
22 procedure for imposition of penalties against Respondents is not precisely as now
23 contemplated by Complainant, the amendment of the Complaint herein affords
24 sufficient appropriate due process and permits this matter to proceed if violations are
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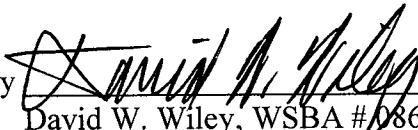
1 found such that an appropriate remedy may subsequently be fashioned by the
2 Commission.

3 ¹² Based on the foregoing, and the liberal construction policies under CR 15, and
4 WAC 480-07-395 (5), the latter which authorizes amendment of pleadings to promote
5 "fair and just results," WCW again seeks leave from the Administrative Law Judge and
6 the Commission to file the attached amended complaint and for process in this matter to
7 continue leading to the rulings and remedies requested therein.

8 Respectfully submitted,

9 DATED this 25th day of August, 2009.

10 WILLIAMS, KASTNER & GIBBS PLLC

11
12 By 
13 David W. Wiley, WSBA #08614
14 Attorneys for Complainant WASTE
15 CONNECTIONS OF WASHINGTON, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by the method as indicated below, pursuant to WAC 480-07-150.

<p><i>Attorneys for Waste Management Disposal Services of Oregon, Inc. and Enviro/Con & Trucking, Inc.</i> Polly L. McNeill Summit Law Group 315 – 5th Avenue S. Seattle, Washington 98104 <u>pollym@summitlaw.com</u></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>
<p>Brad Lovaas Executive Director Washington Refuse and Recycling Association 4160 6th Avenue S.E., Suite 205 Lacey, WA 98503 <u>brad@wrra.com</u></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>
<p><i>Attorney for Washington Refuse and Recycling Association</i> James R. Sells Ryan Sells Uptegraft Inc. PS 9675 Levin Road N.W., Suite 240 Silverdale, WA 98383-7620 <u>jimsells@rsulaw.com</u></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>
<p>Bronson Potter Deputy Prosecuting Attorney Clark County Prosecuting Attorney's Office Civil Division P.O. Box 5000 Vancouver, WA 98666-5000 <u>bronson.potter@clark.wa.gov</u></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>

DATED at Seattle, Washington, this 25th day of August, 2009.



 Lyndsay Taylor, Legal Assistant

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

WASTE CONNECTIONS OF
WASHINGTON, INC.,

Complainant,

v.

ENVIRO/CON & TRUCKING, INC. a
Washington corporation; ENVIROCON, INC., a
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DISPOSAL SERVICES OF OREGON, INC.,

Respondents.

Case No. TG-071194

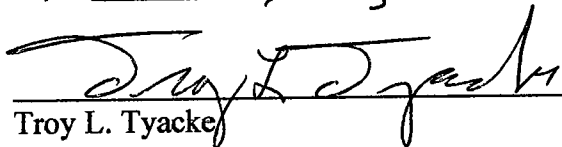
DECLARATION OF
TROY L. TYACKE

I, Troy L. Tyacke, declare under penalty of perjury as follows:

1. I am a citizen of the United States and a resident of the State of Washington. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.
2. I am employed by Waste Management Disposal Services or Oregon, Inc. My present position is with the Industrial Sales division.
3. I have been responsible for customer service to the Evergreen Aluminum Smelter site owners since May 2006. To my knowledge, other than asbestos all of the waste generated in the environmental remediation and redevelopment of the Evergreen Aluminum Smelter site has been disposed at landfills owned by Waste Management Disposal Services of Oregon, Inc. Less than 10% of this waste stream was C&D Waste.
4. All the facilities at the Evergreen Aluminum Smelter site have been demolished with the exception of three remaining structures: the scalehouse and guardhouse (which are to remain on the property for the subsequent owner), and a steel-sided equipment storage structure (which is to be recycled).

5. Waste Management Disposal Services of Oregon, Inc. has finished all work that involves arranging for the collection and/or transportation of C&D Waste from the Evergreen Aluminum Smelter site.

DATED this 25th day of February, 2008, at Portland, Oregon.



Troy L. Tyacke

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WASTE CONNECTIONS OF
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OREGON, INC.,

Respondents.

NO. TG-071194

DECLARATION OF CHRIS ROSE
REGARDING INITIAL ORDER NO. 3
ON SUMMARY DETERMINATION

Chris Rose Declares:

1. I am the Director of Regulatory Services for the Commission and am over 18 and competent to testify in the matters set forth below and have personal knowledge of those matters.
2. As Director of Regulatory Services, I oversee Regulatory Services Staff and its participation in adjudications before the Commission.
3. I have read the Initial Order No. 3 on Motion for Summary Determination in this docket and I believe the Order raises some important policy implications that I wish the Commission to consider in the administrative review process.

DECLARATION OF CHRIS ROSE REGARDING INITIAL ORDER
NO. 3 ON SUMMARY DETERMINATION - 1

EXHIBIT 2

4. My comments are directed specifically to paragraphs 4, 18, 19 and 21 in the Initial Order on Summary Determination on Review. There, the Administrative Law Judge makes some specific findings regarding private party complaints, and the lack of Commission Staff representation/participation in complaint proceedings under RCW 81.04.110.

5. First, in paragraph 4, he notes that neither the Commission's regulatory Staff nor the Public Counsel Section of the Attorney General's Office entered an appearance at any stage of this proceeding.

6. Speaking for the Regulatory Staff, we typically do not seek to intervene or otherwise participate in private party complaint cases, particularly where those companies are represented by experienced counsel familiar with the practice of law before the Commission. We might, on the other hand, consider participation where a complainant or respondent is appearing *pro se*, but even that is not a certainty nor otherwise a frequent occurrence in a transportation or water case.

7. It is not possible for Regulatory Staff to be formally involved in every adjudication at the Commission. We simply lack the staffing and funding resources to so participate and no inferences about the public interest or lack thereof should be drawn when we do not participate in private party complaint cases.

8. As the Commission is aware, it, or the Administrative Law Division ("ALD") is free to seek our involvement in particular cases and we do actively participate as accounting or policy advisors when requested by the Commission or ALD, at any phase of the development of a record in an adjudication to which the Commission is not a party.

9. I specifically disagree with the conclusion in paragraph 19 of the Order that "[w]ithout participation by Staff, we run the risk of a decision with unintended consequences or even an erroneous decision because there is no assurance that any party will zealously advocate the public interest." This dicta not only seems to discount the ability of the


Commission to evaluate a hearing record in the public interest but suggests that only the Staff or Public Counsel can advocate or articulate public interest issues or impacts.

10. It may also here overlook the representation of Clark County in the public interest context to which state law assigns an important role for county governments in the implementation of laws, service levels and regulatory oversight in addition to the Commission under RCW 70.95 *et seq.*, as well as in provisions of Title 81.77 RCW.

11. It would be unreasonable to, in essence, preclude private parties from filing a complaint absent a Staff investigation or a Staff complaint to show cause. Had the Administrative Law Judge not granted the Summary Determination Motion, he would have had to decide the case on its merits, without benefit of Staff's involvement. Any decision necessarily would have required an evaluation of the public interest issues raised by the complaint and on the hearing record.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of May, 2008 at Olympia, Washington.

By 
Chris Rose